United States Court of Appeals

for the Second Circuit

PETITION FOR REHEARING EN BANC

75-1425

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UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

B
P/S.

UNITED STATES OF AMERICA,

Appellee,

vs.

ARON SCHATTEN,

Appellant

PETITION FOR REHEARING FOR APPELLANT ARON SCHATTEN
OR FOR REHEARING BY COURT OF APPEALS IN BANC

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UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

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UNITED STATES OF AMERICA,

Appellee,

Docket No. 75-1425

vs.

ARON SCHATTEN,

Appellant.

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TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT:

On November 4, 1975, Aron Schatten was convicted on a One Count Indictment (75 Cr. 739), after a 2 day jury trial before Judge Wyatt, charging him with unlawful possession on July 17, 1974 of shirts stolen from a motor truck in interstate shipment. He remained on bail under a $10,000 personal recognizance bond, plus $1,000 cash which he posted.

On Friday, December 12, 1975, he was sentenced to a term of imprisonment of 3 years and ordered remanded, at the request of the Government.*

Judge Wyatt, however, modified his order and permitted Schatten to remain on bail until Monday, December 15, 1975. On that day (Judge Wyatt having gone on vacation), Judge Werker permitted Schatten to remain on bail until December 19th, at which time he surrendered to the marshal as ordered.

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* Promptly after sentence, on December 12, 1975, Judge Wyatt signed an order granting defendant's application to proceed in forma pauperis (Title 28, section 1915), thereby indicating that he is of the opinion that defendant's appeal has merit and is not frivolous. At the time of sentence, while highly praising present counsel's memorandum of law submitted on his motion to vacate the jury's verdict, Judge Wyatt, in denying the motion, pointed out that counsel's arguments "ought to be addressed to an appellate court." (p.3, Sentence Minutes)

On December 19th, Judges Timbers and Hays denied bail pending appeal, Judge Gurfein strongly dissenting. While Judge Gurfein discussed the legal reasons for his dissent, the majority did not enter into any discussion of the legal points raised, nor did they, in fact, state any reasons for its decision.

Presiding Judge Timbers, however, over appellate counsel's strong objections, ordered the appeal expedited, with argument set for the week of February 9, 1976.

On February 13, 1976, before Judges Timbers (Presiding), Bryan and Holden the appeal was argued, counsel being allowed only fifteen minutes by Judge Timbers although counsel had requested, in writing, that he be allowed at least 25 minutes. Decision was reserved, but on February 19th, he received, in the mail, the unanimous decision, without opinion, dated February 13, 1975, the same day as the argument, affirming the judgment of conviction.

Of the POINTS raised in Appellant's Brief, the most serious ones warranting an in banc hearing are the following:

POINT I-BECAUSE OF THE WEAKNESS OF THE GOVERNMENT'S CASE, AND CERTAINLY ON THE ENTIRE CASE, THE COURT SHOULD HAVE DIRECTED JUDGMENT OF ACQUITTAL ON THE AUTHORITY OF TAYLOR v. UNITED STATES, 464 F.2d 240 (2d Cir.1972)

This POINT is discussed at pp. 2-18 of Appellant's Brief.

It would seem that some District Judges and perhaps even some Circuit Court Judges should have pointed out to them in strong language by an in banc court decision that Taylor v. United States is the law of this Circuit and must be followed.

POINT II(A) SUBSTANTIAL ERROR WAS COMMITTED IN ALLOWING INTO EVIDENCE, AS PART OF THE GOVERNMENT'S CASE IN-CHIEF, THE DEFENDANT'S PRIOR CONVICTION

This POINT is fully discussed at pp.18-22 of Appellant's Brief.

POINT II(B) AS A MATTER OF LAW AND FACT THE PRIOR CRIME WAS NOT SIMILAR TO THE PRESENT CRIME AND WAS USED BY THE GOVERNMENT PROSECUTOR TO SHOW A PROPENSITY ON THE PART OF THE DEFENDANT FOR COMMITTING CRIME

This POINT is discussed at pp.23-30 of Appellant's Brief.

Schatten's prior conviction was under the first paragraph of Title 18, sec. 659, for stealing Unisonic AM-FM stereos. (A stereo is not a radio per se but a combination of phonograph, amplifiers and radio. It is important to note this distinction between a stereo and a radio in view of the contents of prosecutor's extremely unethical summation which will be discussed later.)

His present conviction was under the second paragraph of Title 18, section 659, for unlawful possession of shirts.

Title 18, section 659 reads, as follows:

> (1st paragraph) Whoever embezzles, steals, or unlawfully takes, carries away, or conceals * * * with intent to convert to his own use any goods or chattels moving as or which are part of or which constitute an interstate or foreign shipment of freight or express; or
>
> (2nd paragraph) Whoever buys or receives or has in his possession any such goods or chattels, knowing the same to have been embezzled or stolen * * *. (Emphasis supplied)

The fact that these two independent paragraphs are both found in the same statute, to wit, Title 18, sec.659, does not make them similar crimes as the Government erroneously contends. The 1st paragraph charges the crime of larceny of interstate or foreign commerce, whereas the 2nd paragraph charges the crime of possession or receiving of interstate or foreign commerce. The 1st paragraph might just as well have appeared under a different section of law. Surely, the Government could not then raise the specious argument that the two crimes are similar because they appear in the same section of law, to wit, Title 18 U.S.C. section 659.

If a prior conviction is for a crime which is not similar to the present crime charged, then the prior conviction is irrelevant and incompetent and inadmissible as part of the Government's case in-chief on the issue of guilty knowledge or intent because then all it proves is that the defendant has a propensity for committing crime.

In United States v. Fields, 466 F2d 119 (2d Cir.1972), in reversing the conviction, the Court pointed out that the trial court erroneously read from the 1st paragraph of section 659. This paragraph, the Court pointed out deals with the unlawful taking of goods but defendants were not charged with that crime. They were charged under the 2nd paragraph of section 659 with the unlawful receiving and possessing of stolen property which is a different crime than that charged under the 1st paragraph

Likewise , under Count One of the prior indictment (quoted at pp.23-24 of Appellant's Brief and to which he pleaded guilty), Schatten was charged under the 1st paragraph of section 659, with having stolen a quantity of Unisonic AM-FM stereos. Simply stated, he was accused of being a thief who because he stole a quantity of Unisonic AM-FM stereos he had thereby committed the crime of Larceny.

On the other hand, under the present indictment (75 Cr. 739), Schatten was not accused under the first paragraph of section 659 of taking or stealing stolen property. On the contrary, he was charged under the second paragraph of section 659 with the unlawful possession of stolen shirts. Simply stated, unlike the prior indictment which charged the crime of Larceny, under the present indictment he was being charged with the crime of unlawful Possession of stolen property, that is, property that some person or persons other than Schatten had stolen.

In fact, on the evidence in the present case, not only was it highly speculative that Schatten ever possessed the stolen shirts or any of the stolen shirts sold to Goldberger, but it can be argued with equal fervor that Schatten was the thief or one of the thieves or merely an emissary or go-between of the thieves and purchaser of the stolen shirts. But he was not indicted under any of these theories.

As the court in the Fields case held, the 1st and 2nd paragraphs of section 659 charge different or dissimilar crimes so they definitely and as a matter of law are not similar crimes as the Government has been persistently contending. There is no question but that Larceny and Receiving or Possession of stolen goods are different crimes. People v. Moro, 23 N.Y.2d 496,500, 297 N.Y.S.2d 578, citing People v. Daghita, 301 N.Y. 223,228.

(For distinctions between the modus operandi of Schatten's prior crime of Larceny and the modus operandi of the thief or thieves involved in the present theft of the motor truck containing the stolen shirts, see pp.28-29 of Appellant's Brief. For legal definitions of word "similar," see pp. 26-27 of Appellant's Brief.)

Judge Gurfein, on the motion for bail pending appeal, in his strong dissent, recognized the dissimilarity between Schatten's prior crime (under the 1st paragraph of section 659) and the present crime (under the 2nd paragraph of section 659) when, in substance, he stated:

> "I cannot for the life of me see how the larceny of stereos can be used to prove that the possession of stolen shirts was with knowledge that the shirts were stolen."

He accused the Government of improperly using this prior conviction for the crime of larceny to beef up its case of criminal possession. Judges Timbers and Hays were silent on the point and in fact did not express any opinion on any legal point, but Judge Gurfein was very outspoken in his legal opinion, all of which favored Schatten.

It is respectfully submitted that the present panel either has overlooked the Fields case which makes it quite clear that the crime of larceny under the 1st paragraph of section 659 and the crime of possession under the 2nd paragraph of section 659 are different crimes, or it refuses to follow it. At a rehearing it will have the opportunity of reversing its present decision and following Fields; or having the court sitting in banc decide whether Schatten's judgment of conviction should be reversed as mandated by the Fields case.

At p.19 of its Reply Brief, the Government appears to contend that in a criminal Possession case, the prior conviction, in order to be admissible on the issue of knowledge or intent, need not also be for the crime of criminal Possession, but could be for the crime of Larceny. The untenable position it appears to press is that so long as the acquisition of the goods was unlawful, the prior crime would be relevant and admissible on the issue of guilty knowledge or intent in the present case where the crime charged is criminal Possession.

By affirming Schatten's judgment of conviction, it would appear that the present panel has erroneously accepted this wholly erroneous argument. If the prior crime need not be similar--counsel has never contended that the prior crime must be identical-to the present crime charged to be admissible on the issue of guilty knowledge or intent, but the unlawful acquisition be the test of admissibility, then it would follow that if the stolen goods were acquired unlawfully, whether by the commission of the crime of Larceny, or by the commisiion of the crime of Burglary, Robbery, Arson, or even Murder, a conviction for any of these crimes would be admissible on the issue of guilty knowledge or intent in a criminal Possession case. Such a test is unacceptable because it would show that a defendant has a propensity for committing crime. It is for that reason that it has uniformly been rejected by the courts throughout the country. The point is so clear that it need not be belabored here. With all due respect to the present panel, this impermissible test appears to have been accepted by it in the light of its judgment of affirmance without opinion. Unless an in banc court rules otherwise, this very serious erroneous principle of law apparently applied in Schatten's case will be cited by the Government in the future as establishing the propriety of its impermissible test.

It is respectfully submitted that at an in banc hearing, it is counsel's opinion [redacted] the court would reject such a fallacious principle which is contrary to the law in every other circuit as well as contrary to the law in the courts of the various states throughout the country.

Furthermore, since the Government did not prove possession by Schatten of a single stolen shirt, the case, under Taylor v. United States, 464 F.2d 240(2d Cir.1972) should never have gone to the jury. Secondly, as pointed out in United States v. DeCicco, et.al., 435 F.2d 478 (2d Cir. 1960), where, in dealing with the issue of admissibility of prior crimes as part of the Government's case in-chief, the court stated (at p.483; also quoted at page 5A of Appellant's Reply Brief):

> Evidence of prior crimes is customarily not admissible to show the disposition, propensity or proclivity of an accused to commit the crime charged. (Citing numerous authorities.)
>
> The Court further went on to enunciate the test to be used in such cases, as follows (483): * * * the evidence of intent, etc. is placed in issue in the case at trial, either by the nature of the facts sought to be proved by the prosecution or the nature of the facts sought to be established by the defense.
>
> United States v. Smith, 283 F.2d 760,763 (2d Cir.1960)

Since at the very outset, in his opening to the jury, Schatten's counsel had made it very clear that Schatten would defend on the ground he had never committed the offense charged, accordingly, as in DeCicco and in Smith, intent or knowledge was never placed in issue by him. It therefore followed that proof of an alleged similar act or crime was irrelevant and had been improperly admitted at Schatten's trial, particularly in view of the fact that the Government having failed to prove possession by Schatten of a single stolen shirt, the issue of knowledge of guilty possession was never actually reached.

Lumbard,Ch.J., concurring in the DeCicco case, took an even more restrictive view than the majority, stating that (486):

> The rule regarding the admission of evidence of similar crimes can be simply stated. Such evidence because of its highly prejudicial nature, is not admissible until the defendant has raised the issue of motive and intent. United States v. Smith, 283 F.2d 760,763 (2d Cir.1960). (Emphasis supplied)

As indicated, Schatten unquestionably denied possession even of a single stolen shirt and so did not directly raise the issue of motive or intent. United States v. Smith, 283 F.2d 760,763 (2d Cir.1960). Therefore, under the rule enunciated by Lumbard,Ch.J., on the issue of guilty knowledge, the Government had no right,as part of its case in-chief,to offer evidence, over the defendant's objection, of a similar crime, even assuming arguendo that the prior conviction for Larceny of stereos was for a crime similar to the present crime. (United States v. DeCicco, supra, citing United States v. Smith, supra.)

If this panel does not wish to follow the DeCicco and Smith cases, or,what is more interesting, it does not wish to follow Chief Judge Lumbard's enlightened concurrent opinion, then an in banc court should have the opportunity of adopting the eminently fair rule Chief Judge Lumbard promulgates for the admission of similar crimes as part of the Government's case in-chief. Evidently what the Chief Judge had in mind was to prevent defendants from being convicted, not because the evidence necessarily warrants it but because they have been previously convicted.

POINT III EVEN IF THE PRIOR CONVICTION WERE SIMILAR TO THE PRESENT CRIME, IT NEVERTHELESS SHOULD HAVE BEEN HELD INADMISSIBLE BECAUSE IT WAS TOO REMOTE FROM THE PRESENT CRIME TO BE RELEVANT

This POINT is discussed at pp. 30-31 of Appellant's Brief and at p.13 of Appellant's Reply Brief.

The prior crime was committed on October 22-23,1970, whereas the present crime was committed between July 17-22, 1974, almost four years later, thereby making the prior crime too remote to be relevant on the issue of guilty knowledge.

Under the New York cases discussed at pp.30-31 of Appellant's Brief, evidence of other similar acts is admissible to show guilty knowledge on the occasion in question if these other acts were made "at or about the same time by the same person charged." Expressing the same idea in different language, the court said, similar "contemporaneous" acts are admissible.

While it is difficult to set a specific date beyond which prior similar crimes will be held inadmissible on the issue of knowledge or intent, there should be no difficulty in setting a period beyond which proof of prior crimes will be held inadmissible as too remote. A period of almost four years should have come within this inadmissible category. To hold that such period should merely affect weight and not admissibility is to beg the question, to the serious prejudice of the defendant Schatten.

It is respectfully submitted that unless the present panel changes its decision, it will stand for the archaic principle that a similar prior crime, no matter how remote from the present crime, is nevertheless relevant and admissible on the issue of guilty knowledge. Furthermore, the present panel may be accused, unless it clarifies its views, that it does not believe that there is any reasonable probability that a person can ever be rehabilitated with the passage of time and that it believes in the objectionable principle,frowned upon by experienced criminologists, that "once a criminal, always a criminal."

If the present panel does not believe in the above illiberal principles, it is respectfully submitted that it should say so at a rehearing or be willing to have the issue squarely decided by an in banc court.

POINT IV(A) EVEN IF THE PRIOR CONVICTION WERE TECHNICALLY ADMISSIBLE FOR THE LIMITED PURPOSE OF GUILTY KNOWLEDGE, THE SUMMATION OF THE GOVERNMENT PROSECUTOR WAS SO GROSSLY IMPROPER AND DELIBERATELY DECEPTIVE BOTH FACTUALLY AND LEGALLY AS TO COMPLETELY VITIATE THE EFFECT OF THE COURT'S CAUTIONARY INSTRUCTIONS. FURTHERMORE, THE SUMMATION WAS AIMED AT CONVINCING THE JURY THAT SCHATTEN HAD A PROPENSITY FOR STEALING AND SELLING RADIOS, ALTHOUGH THE PRIOR CRIME WAS ONLY FOR STEALING (NOT ALSO FOR SELLING) STEREOS (NOT RADIOS) AND ALTHOUGH THE PRESENT CHARGE WAS SOLELY FOR CRIMINAL POSSESSION OF SHIRTS (AND NOT FOR STEALING THE TRUCK OR THE SMALL QUANTITY OF RADIOS THAT WERE ON THE STOLEN TRUCK)

This POINT is fully discussed at pp.32-36 of Appellant's Brief and at pp.13-15 of Appellant's Reply Brief.

It is respectfully submitted that if this panel does not grant a rehearing and does not reverse the present conviction with appropriate castigation of the Government prosecutor, other Governemt prosecutors will be encouraged to follow his footsteps and shamelessly violate a defendant's due process rights during summation, without fear of criticism from the Appeal Court.

If this panel does not grant a rehearing and a reversal and severely castigates the Government prosecutor, then, it is respectfully submitted, that an in banc court should be empanelled so that it may have the opportunity of exercising its supervisory powers to protect defendants from unethical conduct of Government prosecutors.

POINT IV(A) UNDER THE CIRCUMSTANCES OF THIS CASE IT WAS IMPROPER FOR THE PROSECUTOR IN HIS SUMMATION TO COMMENT ON THE DEFENDANT'S FAILURE TO CALL WITNESSES; AND IT ALSO WAS IMPROPER TO MAKE HIMSELF AN UNSWORN GOVERNMENT WITNESS AGAINST THE DEFENDANT

This POINT is discussed at pp.37-40 of Appellant's Brief and at pp.13-15 of Appellant's Reply Brief and is further illustration of the Government prosecutor's inexcusable conduct which warrant's the Court's severe condemnation.

POINT VII REVERSIBLE ERROR WAS COMMITTED WHEN THE COURT CHARGED RELATIVE TO POSSESSION OF GOODS RECENTLY STOLEN.

This POINT is fully discussed at pp.44-46 of Appellant's Brief.

As pointed out at p.44 of Appellant's Brief, the trial court charged (Tr.248);

> "that possession of goods recently stolen, if not satisfactorily explained is a circumstance from which the jury may reasonably draw the inference and find that the person in possession knew that the goods had been stolen."

Why this instruction definitely should not have been given, see pp.44-45 of Appellant's Brief, and it is respectfully submitted that the POINT is serious enough and sufficiently challenging for an in banc court hearing and decision.

POINT VI THE ADMISSION IN EVIDENCE OF THE TESTIMONY OF GOLDBERGER OF HIS HEARSAY CONVERSATION WITH THE TWO UNIDENTIFIED DELIVERYMEN CONSTITUTED REVERSIBLE ERROR

This POINT is fully discussed at pp.42-44 of Appellant's Brief and at pp.6-10 of Appellant's Reply Brief.

Since the admission in evidence of this hearsay conversation was extremely detrimental to the defendant's right to a fair trial which means a trial based on competent evidence, and the Government failed to refute the incompetency of this hearsay conversation, it is respectfully submitted that there is absolutely no justification for the panel to have countenanced the admission of this incompetent evidence which was so extremely prejudicial to the defendant's right to a fair trial. It should therefore grant a rehearing and reverse the present affirmance of the judgment of conviction; or, in the alternative, grant a hearing in banc where the issue may be appropriately and fairly decided so that trial judges may be properly guided in passing on the competency and relevancy of this type of evidence.

It is respectfully submitted that on reconsideration this Court should grant a rehearing and, on such rehearing, vacate its affirmance of the judgment of conviction and reverse the judgment and either dismiss the indictment or grant a new trial; or, in the alternative, a rehearing by the Court of Appeals in banc should be ordered.

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STATE OF NEW YORK,
COUNTY OF NEW YORK, ss.:

ALFRED I. ROSNER, being duly sworn deposes and says. he is the Peititoner and Attorney for Appellant Aron Schatten herein; that he has read the foregoing Petition and knows the contents thereof; that the same is true to deponent's own knowledge, except as to matters therein stated on information and belief, and as to those matters he believes it to be true.

Alfred I. Rosner

Petitioner and Attorney for
Appellant Aron Schatten

Sworn to before me this
24th day of February, 1976

Martin B. Rosner

MARTIN B. ROSNER
Notary Public, State of New York
No. 31-4522053
Qualified in New York County
Commission Expires March 30, 1976

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THOMAS J. CAHILL
U. S. ATTORNEY
SO. DIST. OF N. Y.